Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000438-001 DT 01/28/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA BRIAN W ROCK

v.

MANDY MCCULLOUGH-PURCELL (001) TRACEY WESTERHAUSEN

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14007457.

Defendant-Appellee Mandy McCullough-Purcell (Defendant) was charged in the Phoenix Municipal Court with driving under the influence and failure to control speed to avoid a collision. Plaintiff-Appellant the State of Arizona contends the trial court abused its discretion in dismissing the complaint with prejudice. For the following reasons, this Court reverses the ruling of the trial court.

I. FACTUAL BACKGROUND.

On April 11, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and failure to control speed to avoid a collision, A.R.S. § 28–701(A). The State later amended the Complaint to add a charge of driving with drugs or metabolite in her system, A.R.S. § 28–1381(A)(3).

Trial began on December 12, 2011, with the selection of the jurors. (R.T. of Dec. 12, 2011, at 28–74.) The next day, the trial court instructed the jurors, and the attorneys made opening statements. (R.T. of Dec. 13, 2011, at 82, 87, 95.)

The State then presented its case. Officer Jeremy Prater testified he responded on April 11, 2011, to the report of a collision in the front yard of a residence. (R.T. of Dec. 13, 2011, at 111–12.) He described his observation of Defendant and her vehicle. (*Id*. at 112–20.) Officer Daniel Adair testified he was the primary officer during the investigation, and described giving Defendant the HGN tests and observing six out of six cues. (*Id.* at 163–70.) Defendant exhibited very poor balance, so for her safety, Officer Adair did not give her any other field sobriety tests. (*Id*. at

170.) He described his further observation of her and the scene of the collision. (*Id.* at 170–80.) Officer Kevin Murphy was the third officer on the scene, and he discussed his observations and that the scene of the collision was in the same neighborhood where Defendant lived. (*Id*. at 101–04.) Officer Jerry Schuiteboer was on duty as a DUI officer on April 11, 2011, and described taking Defendant's blood, and her condition and the statements she made. (*Id.* at 134–50.) After the State's witnesses had testified, the parties stipulated that the results of Defendant's testing showed she had a BAC of 0.149. (*Id*. at 205.) The State then rested. (*Id*. at 206.)

Defendant's attorney then discussed the Ruling from this Court holding a defendant has the burden under A.R.S. § 28–1381(D) of proving use of drugs as prescribed by a licensed practitioner. (R.T. of Dec. 13, 2011, at 207; *see Bayardi v. Fannin*, No. LC 2011–000315, filed Aug. 1, 2011, which the court of appeals affirmed a year later, *State v. Bayardi (Fannin),* 230 Ariz. 195, 281 P.3d 1063 (Ct. App. Aug. 9, 2012)). After some discussion, the trial court denied Defendant's motion for judgment of acquittal. (R.T. of Dec. 13, 2011, at 209.)

Defendant's attorney then presented the testimony of Kristen Furcini, who was a friend of Defendant's. (R.T. of Dec. 13, 2011, at 218–20.) She described receiving a telephone call from Defendant on April 11, 2011, and that an officer said she had been arrested for DUI. (*Id*. at 220–21.) David Griffin testified he was dating Defendant at the time of this incident. (*Id*. at 233–35.) He described being with Defendant that evening, going to bed with her, and being awakened by a police officer knocking on the door and being advised Defendant had been involved in a collision. (*Id*. at 235–43.) He described going to the mobile DUI van to get Defendant and then taking her to a hospital to have her injured wrist treated. (*Id*. at 244–46.)

Defendant's attorney then presented the testimony of Dr. Shayna Mansfield, who was Defendant's family practitioner. (R.T. of Dec. 14, 2011, at 271–72.) She described prescribing medication for Defendant, which included Ambien (Zolpidem), Valium (Diazepam or Benzodiazepam), Celexa or Lexapro (Citalopram), Wellbutrin (Hydroxybupropion), and Adderall, and on cross-examination discussed their effects. (*Id*. at 272–80, 288–311.) For alcohol consumption, she testified it would be a very big concern if someone were to consume "mass quantities of alcohol," but not if they consumed "a very small amount of an additional sedative," such as a beer or a glass of wine. (*Id*. at 281.) She said she was aware of various "sleep behaviors" while a person is taking Ambien, such cleaning house, eating, and driving. (*Id*. at 283–84.)

On cross-examination, the prosecutor question Dr. Mansfield about the effects of combining alcohol with those drugs, and how these drugs would affect a person's ability to drive. (R.T. of Dec. 14, 2011, at 297, 300, 303, 306, 310.) The prosecutor question Dr. Mansfield about her ER (emergency room) training and experience, including asking an ER patient whether they had consumed any alcohol. (*Id*. at 305–06.) When the prosecutor asked Dr. Mansfield how much alcohol would a 120-pound, 5'6" female have to consume to have a 0.149 BAC, Dr. Mansfield said it would depend on the individual, and that she had patients with a 0.20 BAC who were completely alert, oriented, and conversant. (*Id*. at 311–12.) When the prosecutor asked Dr. Mans-

field what kind of documentation a hospital would make if a person came in with a wrist injury, she said, "I mean, usually ER forms and triage forms should be standard." (*Id*. at 312.) The following exchange then took place between the prosecutor, Defendant's attorney, and the trial court:

> [State's Atty.]: For the record, the State requests that the ER documentation be marked as State's Exhibit 14. For the record, I am handing what's been marked as State's Exhibit 14 to Defense counsel.
>
> (Counsel Confer)
>
> [State's Atty.]: For the record, I'm handing what's been marked as State's Exhibit 14 to the witness.
>
> [State's Atty.]: Paging through to the page that has the sticky note on it—
>
> A. Okay.
>
> [Defendant's Atty.]: Can we approach a second, Your Honor—
>
> THE COURT: Yes.
>
> [Defendant's Atty.]: —on this?
>
> (Side Bar Conference)
>
> [Defendant's Atty.]: I don't think it's appropriate for her to ask her questions about a document that's not moved and admitted into evidence. And I don't think that she can lay the foundation to admit my client's hospital records into evidence.
>
> THE COURT: [State's Attorney]?
>
> [State's Atty.]: I didn't ask for them to be admitted. I'm just asking her a question based on an exhibit that Defense counsel—
>
> [Defendant's Atty.]: I didn't—
>
> [State's Atty.]: —labeled—
>
> [Defendant's Atty.]: It's not my exhibit.
>
> [State's Atty.]: —as an exhibit.
>
> [Defendant's Atty.]: I didn't make that as an exhibit.
>
> [State's Atty.]: Defense counsel disclosed this document as an exhibit.
>
> THE COURT: Just 'cause it's disclosed doesn't mean it's admitted into evidence.
>
> [State's Atty.]: I'm not asking for it to be admitted. I'm just asking—I marked it and I'm asking her questions on it.
>
> [Defendant's Atty.]: You can't ask questions about a document not in evidence.
>
> THE COURT: (Indiscernible)—
>
> [State's Atty.]: How can—

THE COURT: —because it—her answers are going to based on the information in the document, which puts it in evidence, and it's not in evidence.

[Defendant's Atty.]: Right.

[State's Atty.]: All right.

(End of Side Bar Conference)

(R.T. of Dec. 14, 2011, at 312–14.) When the prosecutor asked Dr. Mansfield if it would be safe for a person with a 0.149 alcohol concentration to take all the drugs discussed, she said it would absolutely not be safe for a person new to these drugs, but it should not be an issue if a person had been taking the drugs for a while and had stability with them. (*Id*. at 315.) Dr. Mansfield acknowledged a 0.149 alcohol concentration would suggest a significant consumption of alcohol. (*Id*. at 316.) She said Defendant described her alcohol consumption as "social use." (*Id*. at 317.) When the prosecutor asked Dr. Mansfield if Defendant had a very high tolerance or a very low tolerance for alcohol, she said she did not know. (*Id*. at 318.) The following exchange then occurred.

Q. Okay. And so when you're saying it's based on you really don't know [about her tolerance for alcohol], you're prescribing this drug and you're giving the person the information and you're asking them about their alcohol history so that they will use the drug responsibly, right?

A. Yes. When . . . I say I don't know, meaning I've never been in a social situation with her. I don't know what her tolerance is. And when we typically screen for social alcohol use, and we'll say, okay, maybe a couple glasses of wine or a couple drinks on weekends. So we definitely question further as far as use.

Q. When an ER person puts as part of the diagnosis, acute alcohol intoxication, what does that mean?

[Defendant's Atty.]: Wait a minute. Objection, Your Honor. Can we approach?

THE COURT: Yes.

(Side Bar Conference)

[Defendant's Atty.]: I move for a mistrial. She just read from the document you told her she couldn't question about.

[State's Atty.]: I didn't.

[Defendant's Atty.]: You did, too.

[State's Atty.]: I just asked her what that means?

THE COURT: Where did you get that information? Let's go ahead and take a break and make a record.

(End of Side Bar Conference)

THE COURT: All right. Let's take a small break. If you could just wait outside for a few minutes, we'll come and get you.

(Jury Out)

. . . .

THE COURT: Okay. [State's Attorney], where did you get that information?

[State's Atty.]: Your Honor, I asked a question. And I removed the document from the witness so that I wouldn't have a problem with her looking at it.

THE COURT: Where did you get the information?

[State's Atty.]: Acute alcohol intoxication is a common term, Your Honor.

THE COURT: It's not listed in the document I told you not to—that you couldn't use and ask her questions about?

[State's Atty.]: I wasn't—

THE COURT: So you never saw this—

[Defendant's Atty.]: It's right there.

THE COURT: —before you asked her the question?

[Defendant's Atty.]: She highlighted it.

[State's Atty.]: Actually, I didn't highlight it. That is a document that was disclosed by Defense Counsel that I sought to—I marked—

THE COURT: Did you see this information in here when you asked her that question?

[State's Atty.]: Did I see that highlighted portion before I asked her the question?

THE COURT: Yes.

[State's Atty.]: Yes, I did.

THE COURT: All right. So you asked her a question about information in this document that I—

[State's Atty.]: No, I didn't.

THE COURT: —just ruled on was not admitted.

[State's Atty.]: No, I did not.

[Defendant's Atty.]: She did, too.

THE COURT: How is that possible—

[State's Atty.]: My question—

THE COURT: —that you did not do that?

[Defendant's Atty.]: She—the question was, by the way, Your Honor, if I can—

THE COURT: Let's read it—why don't we just play it back?

[State's Atty.]: Okay.

[Defendant's Atty.]: She said, "So if an ER physician writes in the report, acute alcohol intoxication," is what she said. This is an intentional mistrial. It's just reckless.

(R.T. of Dec. 14, 2011, at 318–21.) The trial court and the prosecutor then went through an exchange where the prosecutor explained she was trying to question the doctor about the term "acute alcohol intoxication," and was not trying to question her about the ER report. (*Id*. at 322–25.) Defendant's attorney again said the prosecutor was asking about what was written in the report:

. . . and then she said so if an ER physician writes that in the report . . . .

. . . she ignored your order, Judge, and specifically asked a question from that report about the ER physician recording that.

(R.T. of Dec. 14, 2011, at 325–26.) When the prosecutor continue to state she did not ask the witness what was written in the report, Defendant's attorney accused the prosecutor of being dishonest:

[Defendant's Atty.]: This is on the verge of lack of candor to the tribunal, Your Honor. I mean, she just didn't say can you tell me what acute alcohol concentration means. She asked, so if an ER physician writes in a report the Defendant was acute alcohol intoxication—

[State's Atty.]: I didn't say writes in a report.

THE COURT: Let him finish.

[State's Atty.]: I said if an ER—

[Defendant's Atty.]: It—

THE COURT: Let him finish.

[Defendant's Atty.]: If an ER doctor records that, what does that mean, referring to the document. I mean, the only reason—why would she throw an ER doctor into this because—unless she's referring to the document? I mean, there's a certain dishonesty that's going on here, Your Honor, that I don't think the Court can tolerate. I mean, it's pretty disturbing to listen to.

(R.T. of Dec. 14, 2011, at 333–34.) The trial court then granted Defendant's attorney's motion for a mistrial. (*Id*. at 334.)

Defendant's attorney filed a motion asking the trial court to dismiss the charges with prejudice, and the State filed a Response. (Motion, filed Dec. 21, 2011; Response, filed Jan. 5, 2012.) At the hearing on that motion, Defendant's attorney again stated that the prosecutor asked about what was written in the ER report. (R.T. of Jan. 9, 2012, at 344, ll. 9–11; at 348, ll. 7–8.) Defendant's attorney accused the prosecutor of being dishonest and lying to the court. (*Id*. at 347, ll. 3–4, 7, 17; at 352, ll. 4, 6.)

In its ruling, the trial court stated, "I think that it would have been just an improper question if we had not had the bench conference and the specific ruling that came out of it." (R.T. of Jan. 9, 2012, at 353.) It said if the question "came out of the blue" and there had been an objection, it probably would have resulted in a mistrial, but they "would be sitting in a different position because it would have just been a mistake, it would have been unintentional." (*Id*. at 354, ll. 1, 5–7.) It said that was not what happened, and that "I specifically said I don't want you asking questions about information from this document." (*Id*. ll. 10–11.) The trial court therefore stated the prosecutor's conduct was intentional. (*Id*. l. 19; at 355 ll. 11, 23.) The trial court then granted Defendant's motion to dismiss with prejudice. (*Id*. at 356.)

On January 23, 2012, The State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN DISMISSING THE CHARGES WITH PREJUDICE.

The State contends the trial court abused its discretion in dismissing the charges with prejudice. When a trial court grants a mistrial based on prosecutorial misconduct, under article 2, section 10, of the Arizona Constitution, jeopardy attaches under the following conditions when the trial court grants a mistrial either on its own motion or on a motion by the defendant:

> 1. Mistrial is granted because of improper conduct or actions by the prosecutor; and
>
> 2. Such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal; and
>
> 3. The conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.

Pool v. Superior Ct., 139 Ariz. 98, 108–09, 677 P.2d 261, 271–72 (1984) (footnote omitted). In *Pool*, while the trial progressed, it appeared the state had mischarged the offense, with the result the defendant would probably be found not guilty. The prosecutor then adopted the following tactic, which the court described as follows: "[T]he cross-examination moved from the irrelevant and prejudicial to the egregiously improper." 139 Ariz. at 101, 677 P.2d at 264. The court then discussed the numerous instances of prosecutorial misconduct. 139 Ariz. at 102–03, 677 P.2d at 265–66. The court held the prosecutor's conduct was such that jeopardy attached and retrial was barred:

> Turning to the case at bench and applying the test outlined above, we note first that the mistrial was granted by the trial judge because of improper conduct by the prosecutor. Applying minimum standards of legal knowledge and competence, we

> must conclude that the prosecutor's conduct was not simply erroneous, negligent or mistaken; portions of the questioning are so egregiously improper that we are compelled to conclude that the prosecutor intentionally engaged in conduct which he knew to be improper, that he did so with indifference, if not a specific intent, to prejudice the defendant. The purpose, so far as we can conclude from the record and in the absence of any suggestion of proper purpose from the State, was, at best, to avoid the significant danger of acquittal which had arisen, prejudice the jury and obtain a conviction no matter what the danger of mistrial or reversal. Accordingly, we hold that jeopardy attached and retrial is barred.

139 Ariz. at 109, 677 P.2d at 272.

In *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (1998), the prosecutor was the same person who prosecuted the defendant in *Pool. Hughes* at ¶ 31. The defense was insanity, but instead of presenting evidence to rebut the defendant's insanity defense, the prosecutor attacked the defendant's expert witnesses and any other witness offering testimony favorable to defendant, with the court cataloguing the numerous instances of prosecutorial misconduct. *Id*. at ¶¶ 34–68. The court held the cumulative effect of the prosecutor's misconduct deprived the defendant of a fair trial, and therefore reversed the conviction and remanded to the trial court. *Id*. at ¶¶ 1, 74. On remand, the trial court dismissed the charges against Hughes with prejudice as a result of the prosecutorial misconduct, which the court affirmed on appeal:

> Applying the *Pool* principle to the situation found in the original appeal in this case, we have no choice but to take the unfortunate step of approving the trial judge's order of dismissal on double jeopardy grounds. We do not take this action to sanction the prosecutor for misconduct but because our constitution's double jeopardy clause requires it. We are quite sure the present trial judge took no more pleasure than we do in dismissing the case with prejudice, but the blame must be found elsewhere. This is perhaps the third or fourth time that the conduct of this same prosecutor has raised the same type of problem. It is unfortunate that he was permitted to try so serious a case and, without proper supervision, permitted to try it in such an improper manner.

State v. Jorgenson (Hughes), 198 Ariz. 390, 10 P.3d 1177, ¶ 14 (2000). A Bar complaint was filed against the prosecutor as a result of his conduct in *Hughes*, and based on that conduct and his conduct in *Pool*, the Arizona Supreme Court suspended him from the practice of the law for 6 months and 1 day, followed by probation for 1 year and certain other conditions. *In re Zawada*, 208 Ariz. 232, 92 P.3d 862, ¶¶ 36–28 (2004).

A similar situation occurred in *State v. Minnitt*, 203 Ariz. 431, 55 P.3d 774 (2002), where the court reversed the conviction and held double jeopardy should have barred a retrial:

> We conclude that Arizona's constitutional protection against double jeopardy should have barred Minnitt's 1999 retrial because in both the 1993 and 1997 trials the prosecutor engaged in extreme misconduct that he knew was grossly improper and highly prejudicial, both as to the defendant and to the integrity of the system. Moreover, the trial judge found and the record substantiates that the prosecutor did so with knowing indifference to the danger of mistrial or reversal, if not a specific intent to cause a mistrial.

Minnitt at ¶ 4. Again, the court catalogued the numerous instances of prosecutorial misconduct. *Id*. at ¶¶ 12–25. Based on that misconduct, the court reversed the conviction:

> In most instances, the remedy for prosecutorial misconduct is a new trial. However, the record in the instant case is now replete with evidence that the prosecutor, with full knowledge, introduced false testimony in two trials and thus seriously damaged the structural integrity of both. The inevitable conclusion is that the prosecutor was aware that his actions would deprive Minnitt of a fair trial. We announce today's ruling not to sanction the prosecutor, but to protect the integrity of the justice system.
>
> For the reasons discussed, we hold that Minnitt's 1999 retrial was barred by the double jeopardy clause of the Arizona Constitution. We therefore vacate the convictions and sentences entered at the conclusion of the 1999 trial and instruct the trial court to dismiss the charges against Minnitt with prejudice.

Minnitt at ¶ 44–45 (citations omitted). As with the prosecutor in *Pool* and *Hughes,* a Bar complaint was filed against the prosecutor in *Minnitt.* This time the Arizona Supreme Court as a sanction disbarred the prosecutor. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764, ¶ 78 (2004).

In contrast with *Pool*, *Hughes*, and *Minnett* is *State v. Trani*, 200 Ariz. 383, 26 P.3d 1154 (Ct. App. 2001), where the trial court had granted a mistrial because of prosecutorial misconduct, and then dismissed the charges on the ground of double jeopardy. *Trani* at ¶ 1. The trial court had granted the mistrial based on this instance of misconduct by the prosecutor:

> The prosecutor attempted to rehabilitate the witness on redirect by reading from the witness's statement to police which had predated the plea agreement. In doing so, the prosecutor read a question and answer, which in substance stated that Trani had ordered the raid. The answer was based solely on hearsay and the prosecutor stopped reading at that point.

Trani at ¶ 3. On appeal, the court concluded the trial court had misapplied the test stated in *Pool* and therefore vacated the trial court's order dismissing the case:

> We do not read *Pool* as prohibiting retrial any time a mistrial is declared or new trial ordered based upon prosecutorial misconduct. In order to justify a mistrial, the prosecutor's conduct must deny the defendant a fair trial. But an additional, improper intent to infect the trial with prejudicial error must exist, at least implicitly, in order to

> justify barring a retrial based upon double jeopardy. Here, the objective facts do not indicate the prosecutor intended to force Trani to either finish a trial infected with error or choose a mistrial. He simply erred, and the error was isolated to a single misstep, nothing like the pattern of misconduct that "permeated the trial" in both *Pool* and *Hughes*. We conclude that the trial court abused its discretion.
>
> The order dismissing this case is vacated and the case is remanded for further proceedings.

Trani at ¶¶ 15–16.

Similarly, *State v. Korovkin*, 202 Ariz. 493, 47 P.3d 1131 (Ct. App. 2002), involved the granting of a mistrial as a result of a single act of the prosecutor. Korovkin and Qualls were charged with various offenses based on the allegation they were racing their vehicles, resulting in the death of another motorist. The trial court granted a mistrial as a result of the following:

> Appellant and Qualls were tried together. Because both Qualls and appellant had made statements about "racing" that were admissible against themselves but, arguably, not against their codefendant, each defendant had a different jury, which allowed for the appropriate screening of inadmissible evidence. In opening statements made before both juries, the prosecutor stated, "Both defendants admitted racing down Oracle." Each defendant moved for a mistrial, [which the trial court granted].

Korovkin at ¶ 6. After he was convicted after retrial, on appeal Korovkin contended the trial court should have dismissed the charges based on prosecutorial misconduct. The court agreed with the trial court that the prosecutor's statement, if improper, was not intentional. *Id*. at ¶ 8. It further concluded there was nothing to show the prosecutor attempted to provoke a mistrial in order to gain a tactical advantage. *Id*. at ¶ 9. It therefore concluded double jeopardy did not bar the retrial. *Id*. at ¶ 10.

Based on the above, this Court concludes the prosecutor's conduct in the present case is more akin to the isolated incident that occurred in *Trani* and in *Korovkin,* rather than the multiple incidents of misconduct that occurred in *Pool, Hughes,* and *Minnett.* Based on the three-part test stated in *Pool,* this Court therefore concludes the trial court erred in dismissing the charges against Defendant with prejudice.

1. *Was the prosecutor's conduct improper.*

This issue here arose when Defendant's attorney made the following statement:

> I don't think it's appropriate for her to ask her questions about a document that's not moved and admitted into evidence.

(R.T. of Dec. 14, 2011, at 313, ll. 15–17.) Defendant's attorney restated this concept:

> You can't ask questions about a document not in evidence.

(*Id*. at 314, ll. 10–11.) Defendant's attorney contended the prosecutor did not "follow the rules of evidence." (R.T. of Jan. 9, 2012, at 346, l. 6.) This Court has been unable to find any rule under the Arizona Rules of Evidence that precludes an attorney from asking questions about a document not admitted in evidence. To the contrary, those rules allow a party to question an expert witness based on facts or data that need not be admissible in evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 703, ARIZ. R. EVID., *see State v. Joseph*, 230 Ariz. 296, 283 P.3d 27, ¶¶ 7–13 (2012) (medical examiner permitted to give opinion based in part on autopsy report prepared by doctor who did not testify; autopsy report not admitted in evidence). In the present case, the prosecutor did not establish the facts in the ER report were of a type reasonably relied upon by experts in the particular field in forming opinions, but if she had been allow to do so, those facts then could have been admitted in evidence to show the basis of the expert's opinion. There thus was at lease a reasonable basis for the prosecutor's conduct.

2. *Did the prosecutor know the conduct was improper and did she pursue that conduct with indifference to a significant resulting danger of mistrial or reversal.*

Defendant's attorney appears to contend the prosecutor engaged in multiple instances of misconduct:

> I don't see how anybody . . . could conclude that[,] as the State noted in its pleading[,] that this was a single indecent of legal error or mistake.

(R.T. of Jan. 9, 2012, at 340, ll. 5–9.) The prosecutor may have asked two separate questions, but as far as this Court can tell, this was all part of a single incident.

For three reasons, this Court concludes the trial court erred when it found the prosecutor intentionally engaged in conduct that required the granting of a mistrial and the dismissal with prejudice. First, it is not entirely clear what the trial court's ruling was. It appears instead Defendant's attorney made an objection, then Defendant's attorney sustained that objection, and the trial court agreed with that ruling:

> [Defendant's Atty.]: I don't think it's appropriate for her to ask her questions about a document that's not moved and admitted into evidence. And I don't think that she can lay the foundation to admit my client's hospital records into evidence.

[Discussions by State's Attorney, Defendant's attorney, and the trial court.]

[Defendant's Atty.]: You can't ask questions about a document not in evidence.

THE COURT: (Indiscernible)—

[State's Atty.]: How can—

THE COURT: —because it—her answers are going to based on the information in the document, which puts it in evidence, and it's not in evidence.

[Defendant's Atty.]: Right.

[State's Atty.]: All right.

(R.T. of Dec. 14, 2011, at 312–14.) Thus, the trial court's ruling is not entirely clear. It appears the trial court was accepting Defendant's attorney's statement that you may not ask questions about a document not in evidence.

Second, assuming that was the trial court's ruling, the prosecutor did not violate that ruling. The prosecutor asked the following question:

When an ER person puts as part of the diagnosis, acute alcohol intoxication, what does that mean?

(R.T. of Dec. 14, 2011, at 319, ll. 9–10.) The prosecutor was attempting to form a hypothetical question that was based on information contained in the ER report, but she was not asking "questions about a document not in evidence." Defendant's attorney, however, took several opportunities to convince the trial court that the prosecutor was asking the witness specifically about what was written in the ER report:

She said, "So if an ER physician writes in the report, acute alcohol intoxication," is what she said. This is an intentional mistrial. It's just reckless.

(R.T. of Dec. 14, 2011, at 321, ll. 22–24.)

. . . and then she said so if an ER physician writes that in the report . . . .

(*Id*. at 325, l. 13.)

. . . she ignored your order, Judge, and specifically asked a question from that report about the ER physician recording that.

(*Id*. at 326, ll. 2–4.) When the prosecutor attempted to explain to the trial court that she did not ask the witness what was written in the report, Defendant's attorney accused her of being dishonest:

> Defendant's Atty.]: This is on the verge of lack of candor to the tribunal, Your Honor. I mean, she just didn't say can you tell me what acute alcohol concentration means. She asked, so if an ER physician writes in a report the Defendant was acute alcohol intoxication—
>
> [State's Atty.]: I didn't say writes in a report.
>
> THE COURT: Let him finish.
>
> [State's Atty.]: I said if an ER—
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> [Defendant's Atty.]: It—
>
> THE COURT: Let him finish.
>
> [Defendant's Atty.]: If an ER doctor records that, what does that mean, referring to the document. I mean, the only reason—why would she throw an ER doctor into this because—unless she's referring to the document? I mean, there's a certain dishonesty that's going on here, Your Honor, that I don't think the Court can tolerate. I mean, it's pretty disturbing to listen to.

(*Id*. at 333, ll. 23–25; at 334, ll. 1–14.) This Court therefore concludes Defendant's attorney either intentionally or knowingly misled the trial court about what the prosecutor's question was, or else did so with indifference to what the question actually was. The result was the trial court found the prosecutor "blatantly disregarded what I told you up here at the bench." (*Id*. at 334, l. 16.) This Court concludes therefore the trial court erred when it found the prosecutor intentionally violated the trial court's ruling.

Third, assuming the prosecutor committed misconduct in asking the question she did ask, the record does not indicate she did so to gain an unfair advantage, such as what happened in *Pool, Hughes,* and *Minnett*. In *Pool,* the prosecutor came to the conclusion he was losing the case and needed to start over, and the only way he could do that is to provoke the defendant into asking for a mistrial. In *Hughes,* the prosecutor did not have any evidence to rebut the defendant's insanity evidence, so the prosecutor chose to ask improper and highly inflammatory questions to degrade the defendant's witnesses. And *Minnett,* the prosecutor went to the extent to use perjured testimony to try to win a conviction.

In contrast, at the point when the prosecutor asked the question to which Defendant's attorney objected, the case was not going particularly better or worse for either side. There were yet to come, however, several difficult tasks for Defendant. In order to be found not guilty of the (A)(3) charge, Defendant had the burden of establishing she was "using a drug as prescribed by a [licensed] medical practitioner." A.R.S. § 28–1381(D). She thus had the burden of establishing that taking Ambien, Valium, Celexa or Lexapro, Wellbutrin, and Adderall, and then drinking alcohol to the point where she had a blood alcohol concentration of 0.149 was using those drugs as prescribed. Further, her defense to all three of the DUI charges was the Ambien caused her to sleep-drive, and therefore she did not commit a voluntary act: " 'Voluntary act' means a bodily

movement performed consciously and as a result of effort and determination." A.R.S. § 13–105(42). The trial court had not yet addressed whether Defendant's use of prescribed medications did or did not constitute a defense for her alleged criminal acts:

> Temporary intoxication resulting from the voluntary ingestion, consumption, inhalation or injection of alcohol, an illegal substance under chapter 34 of this title or other psychoactive substances or the abuse of prescribed medications does not constitute insanity and is not a defense for any criminal act or requisite state of mind.

A.R.S. § 13–503. This Court therefore concludes the trial court erred in finding the prosecutor's conduct required a dismissal with prejudice.

III. CONCLUSION.

Based on the foregoing, this Court concludes the prosecutor did not engage in improper conduct, and even if her conduct were considered to be improper, she did not do so with the intent to gain an unfair advantage over Defendant. The trial court erred in finding the prosecutor's conduct required a dismissal with prejudice.

IT IS THEREFORE ORDERED vacating the ruling of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 012820131200